

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 14, 2008

ANTHONY L. GRANT, JR. v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County

No. 2005-A-447 J. Randall Wyatt, Jr., Judge

No. M2007-00052-CCA-R3-PC - Filed September 8, 2008

In November 2005 the Davidson County Criminal Court revoked the community corrections sentence of the petitioner, Anthony L. Grant, Jr., and ordered that he serve his sentence in the custody of the Department of Correction. In October 2006, the petitioner filed a petition for post-conviction relief, which the post-conviction court summarily dismissed based on its determination that the petition was filed beyond the one-year statute of limitations established by the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-101 et. seq. The petitioner appeals, alleging that the post-conviction court erred in its determination that the petition was time-barred. After reviewing the record, we conclude that the petitioner's claims regarding his initial guilty plea were time-barred but his claims regarding the revocation of his community corrections sentence were not time-barred. Accordingly, we affirm in part and reverse in part the judgment of the post-conviction court and remand this case for additional proceedings as to the petitioner's claims regarding his community corrections revocation.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed
in Part and Reversed in Part; Case Remanded**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. McLIN, JJ., joined.

Anthony L. Grant, Jr., Nashville, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Lisa A. Naylor, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that in March 2005, the Davidson County Grand Jury returned a nine-count indictment against the petitioner, charging him with numerous drug-related offenses and also charging him with felony weapons possession. On June 30, 2005, the petitioner pled guilty to one count of possession of more than 0.5 grams of a schedule II controlled substance (cocaine) with

intent to sell or deliver, a Class B felony, and one count of felony weapons possession, a Class E felony. Pursuant to the plea agreement,¹ the petitioner received an effective eight-year sentence to be served on community corrections probation.

On August 8, 2005, the petitioner conceded a violation of his community corrections probation. The trial court allowed the petitioner to remain on community corrections but increased his sentence by an additional six months. On November 22, 2005, the petitioner conceded an additional violation of his community corrections probation, at which point the trial court revoked the petitioner's probation and ordered that he serve his sentence of eight years and six months in the custody of the Department of Correction.

On October 26, 2006, the petitioner filed a pro se petition for post-conviction relief. The petition alleged that the petitioner's conviction was based on evidence acquired pursuant to an unconstitutional search and seizure and an unlawful arrest, that the petitioner's due process rights were violated "when evidence was entered and Petitioner was not allowed to have it's [sic] authenticity . . . establish[ed]," and that the petitioner received the ineffective assistance of counsel based on trial counsel's failure to file motions to suppress evidence, failure to advise the petitioner of his right to appeal revocation of the petitioner's community corrections sentence, failure to appeal the community corrections revocation, and failure to advise the petitioner of his right to confront and cross-examine witnesses. The post-conviction court summarily dismissed the petition on October 30, 2006, ruling that the petition was filed beyond the one-year statute of limitations and therefore was time-barred. In its order, the post-conviction court referenced only the June 30, 2005 entry date of the petitioner's guilty plea.

On November 15, 2006, the petitioner filed a motion to reconsider in the post-conviction court. In the motion, the petitioner argued that based on the holding of this court in Baker v. State, 989 S.W.2d 739, 741 (Tenn. Crim. App. 1998), the one-year statute of limitations did not begin to run until thirty days after the trial court revoked his community corrections sentence in November 2005. In its order summarily denying the petitioner's motion to reconsider, the post-conviction court found that the date on which the petitioner was "resentenced" for purposes of the community corrections act as interpreted by Baker was August 9, 2005, the date on which the trial court extended the petitioner's community corrections sentence by six months following the petitioner's first community corrections violation. The post-conviction court also ruled that "the [petitioner] was not resentenced on November 22, 2005, nor was his judgment of conviction from August 9, 2005, altered in any manner." Accordingly, the post-conviction court again ruled that the petition for post-conviction relief was time-barred. This appeal followed.

¹The plea agreement, judgments, and transcripts from the petitioner's plea hearing and subsequent hearings regarding the petitioner's community corrections violations do not appear in the record. The procedural history of this case is therefore derived from the petitioner's filings and the post-conviction court's orders denying the filings.

ANALYSIS

On appeal, the petitioner argues that, based on Baker, because the date on which the trial court revoked his community corrections sentence was the date of final conviction for purposes of the post-conviction statute, his petition, which was filed within one year of that date, was timely filed. The state argues that the trial court properly dismissed the petition as untimely.

Tennessee's Post-Conviction Procedure Act provides that a claim for post-conviction relief must be filed "within one (1) year of the date of the final action of the highest state appellate court to which appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred." Tenn. Code Ann. § 40-30-102(a) (2006). "As a general rule, a trial court's judgment becomes final thirty days after its entry unless a timely notice of appeal or a specified post-trial motion is filed." State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996) (citing Tenn. R. App. 4(a) and (c)).

There are few exceptions to this limitations period. The Post-Conviction Procedure Act provides that a petition may be filed beyond the expiration of the one-year limitations period if the otherwise untimely claim (1) is based on a constitutional right that did not exist at trial, (2) is based on new scientific evidence, or (3) seeks relief from a sentence that was enhanced because of a previous conviction that was later held to be invalid. Tenn. Code Ann. § 40-30-102(b)(1)-(3). Additionally, the one-year limitations period may be tolled based on due process concerns, which dictate that strict application of the statute of limitations may not deny a petitioner a reasonable opportunity to assert a claim in a meaningful time and manner when the failure to file in a timely manner is due to circumstances beyond a petitioner's control. State v. McKnight, 51 S.W.3d 559, 563 (Tenn. 2001); Williams v. State, 44 S.W.3d 464 (Tenn. 2001); Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995). None of the statutory or due process-based exceptions apply in this case.

In determining whether the petitioner's post-conviction petition was timely filed, we first briefly review the Tennessee Community Corrections Act of 1985, under which the petitioner was sentenced. The Community Corrections Act permits the court "to sentence an eligible defendant . . . to any appropriate community-based alternative to incarceration provided in accordance with the terms of this chapter, and under the additional terms and conditions as the court may prescribe, in lieu of incarceration in a state penal institution or local jail or workhouse." Tenn. Code Ann. § 40-36-106(e)(1) (2006). The statute also provides, in pertinent part:

The court shall also possess the power to revoke the sentence imposed at any time due to the conduct of the defendant or the termination or modification of the program to which the defendant has been sentenced, and the court may resentence the defendant to any appropriate sentencing alternative, including incarceration, for any

period of time up to the maximum sentence provided for the offense committed, less any time actually served in any community-based alternative to incarceration.

Id. § 40-36-106(e)(4).

In Baker, this court held that the statute of limitations for filing a post-conviction claim did not begin to run until thirty days after a petitioner is resentenced pursuant to the Community Corrections Act. Baker, 989 S.W.2d at 741. Expanding upon our court's holding in Baker, the Tennessee Supreme Court held that "the petitioner may challenge the revocation of a community corrections sentence in a post-conviction proceeding." See Carpenter v. State, 136 S.W.3d 608, 612-13 (Tenn. 2004). The court distinguished its holding in Carpenter from a previous holding of this court, in which we held that "an order revoking probation merely ends the probation term, reinstates the original sentence, does not impose a new sentence, and is not a 'sentence' that may be challenged under the Post-Conviction Procedure Act." Id. at 611 (citing Young v. State, 101 S.W.3d 430, 432 (Tenn. Crim. App. 2002)). The supreme court specifically noted that "[c]ommunity corrections revocation proceedings present two major issues: first, whether the terms of the community corrections sentence have been violated, and second, what sentence should be imposed if a revocation is warranted." Id. at 612 (citing Tenn. Code Ann. § 40-36-106(e)(4)).

Both Carpenter and Baker involved petitioners who initially entered guilty pleas and were sentenced to community corrections. See Carpenter, 136 S.W.3d at 609; Baker, 989 S.W.2d at 740. When the petitioners violated their community corrections sentences, their community corrections sentences were revoked and they were resentenced under the Community Corrections Act. Carpenter, 136 S.W.3d at 610; Baker, 989 S.W.2d at 740. Each petitioner, within one year of the trial court's order in his respective case, filed a post-conviction petition challenging the trial court's revocation and resentencing under the Community Corrections Act; neither petitioner challenged his guilty plea. Carpenter, 136 S.W.3d at 610; Baker, 989 S.W.2d at 740. The respective post-conviction courts dismissed the petitions as untimely, as they were both filed over one year after the initial judgments in the cases became final. Carpenter, 136 S.W.3d at 610; Baker, 989 S.W.2d at 740. On appeal, this court reversed the post-conviction courts, concluding that the one-year limitations period for challenging a trial court's revocation and resentencing order pursuant to the Community Corrections Act did not begin to run until after the trial court's revocation and resentencing order became final. Carpenter, 136 S.W.3d at 610; Baker, 989 S.W.2d at 740. The Tennessee Supreme Court affirmed this court on appeal in Carpenter. 136 S.W.3d at 612-13.

In this pro se petition, it is unclear whether several of the petitioner's stated issues concerned the initial entry of his guilty plea or the trial court's revocation of his community corrections sentence. However, the petitioner's claim of ineffective assistance of counsel based on counsel's alleged failure to appeal the trial court's revocation of the petitioner's community corrections sentence and to inform him of his right to file the appeal clearly concerned the revocation of his community corrections sentence. We are aware that in this case, unlike in Carpenter and Baker, the

trial court did not extend the length of the petitioner's sentence upon revoking his community corrections sentence. However, our interpretation of the Capenter and Baker decisions is that the trial court need not "resentence" a defendant—i.e., extend the length of the defendant's sentence—upon revoking a defendant's community corrections sentence for the defendant to have the right to file a post-conviction petition. Rather, a defendant's exposure to resentencing upon revocation of his community correction sentence grants the defendant the right to file a post-conviction petition regarding the community corrections revocation. Because the petitioner filed his petition within one year of the trial court's revocation order, and because the petition stated a colorable claim for relief, we conclude that the post-conviction court erred by dismissing the petition as it related to the revocation of the petitioner's community corrections sentence.

However, the same cannot be said for any claims the petitioner may have regarding the entry of his guilty plea. This court has previously addressed a case in which a petitioner whose community corrections sentence was revoked sought to challenge the entry of his guilty plea. See Patrick S. Riley v. State, No. M2004-01726-CCA-R3-PC, 2005 WL 1882490, at *1 (Tenn. Crim. App. Aug. 9, 2005). In that case, we concluded that because the post-conviction petition was filed over two years after the petitioner's guilty plea and the corresponding judgments of conviction were entered, the petitioner's claim for post-conviction relief from the conviction was time-barred. Id. Similarly, in this case the petition for post-conviction relief was filed over one year after the original judgment of conviction (in which the trial court sentenced the petitioner to community corrections) and the revised judgment (in which the trial court resentenced the petitioner, adding six months to his community corrections sentence) became final. Accordingly, we conclude that any claims the petitioner may have had as to those proceedings are time-barred.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed in part and reversed in part. The case is remanded to the post-conviction court for appointment of counsel and additional proceedings consistent with the Post-Conviction Procedure Act. On remand, the petitioner is limited to asserting claims associated with the trial court's November 22, 2005 order revoking the petitioner's community corrections sentence.

D. KELLY THOMAS, JR., JUDGE